

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 14 OF 2020

(Originating from Nzega District Court in Criminal Case No.190 of 2018)

SHIJA S/O NDALI @ MATANGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

30th September & 4th December 2020

BAHATI, J.:

The appellant **SHIJA NDALI MATONGO** was convicted in the District Court of Nzega District, at Nzega for the offence of rape contrary to section **130 (1) (2) (e) & 131 (1) of the Penal Code Cap 16** and was sentenced to thirty (30) years in jail.

The background of the matter is straight forward from the record that on unknown date of May 2018 at Bulende area within Nzega, the accused had carnal knowledge with the girl of 16 years old who was a student at Bulunde Secondary school but she ceased going to school in July, 2018 after she got pregnant. The victim was living with her mother and her stepfather. The victim stated that she got pregnant from Shija

Ndali after they had sexual intercourse in May, 2018 for three times. The accused person's brother was the friend of her stepfather and he was not stranger to him as they used to see each other at their home. The accused used to follow her on the farm and for the first time they had sexual intercourse in the house of the accused at Bulunde and the other times they had sexual intercourse in the same house. The victim told the accused that she was pregnant and the accused told her to run away from her home. Their relationship lasted from July, 2018 when she fled to the house of the accused who planned for her escape. They were arrested at the accused's house.

Protesting his innocence, the appellant preferred this appeal against the conviction and the sentence, on grounds that;

- 1. There were gross violations of one of the principles of fair trial namely the rule against bias occasioned by the trial and conviction of the appellant in absentia which breaches **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977** in consideration with **Article 14 (3) of the International Convention on Civil and Political Rights, 1976 (The ICCPR)**, **Article 7 (1) of the African Charter on Human and People's Rights (The Charter)**, **Article and Article 10 of the Universal Declaration on Human Rights, 148 (The UDHR)**. All ratified and domesticated by*

Tanzania. See DPP V. ALLY & OTHERS, Criminal Appeal No. 44 & 45 of 1985 (unreported) and DPP Vs DAUDI PETE [1993] TLR 22.

- 2. The records do not show whether the trial court accorded the appellant opportunity to explain the reasons for his absence during the trial to come to terms with Section 226 (2) of the Criminal Procedure Act [Cap 20 R. E 2002].*
- 3. The appellant was never prosecuted for jumping bail which suggested that the trial court was aware of the reasons for his absence during the trial.*

In the alternative and without prejudice to the afore grounds of complaints, the appellant contends thus,

- 4. The age of the victim's pregnancy was not cogently established in order to ascertain whether it tally/is at par with the alleged date of rape.*
- 5. The alleged PF3 (exhibit P1) was tendered in court without compliance with Section 240 (3) of the Criminal Procedure Act, Cap 20 [R. E 2002], thus liable to be expunged.*
- 6. The learned trial magistrate erred in law for pressing much reliance on the PF3 (exhibit P1) as a proof of rape (penetration) pregnancy and its age while the same has no evidential value worthy of the name (See ground number 5 above).*

7. The voluntariness and all other legal territories of the cautioned statement of the appellant (exhibit P3) were not cogently established.

During the hearing of the appeal, the appellant appeared in person, unrepresented both at the trial court and this court whereas the Republic was ably represented by Mr. Innocent Rweyemamu, learned State Attorney.

The appellant being a layman prayed to this court to adopt his grounds of appeal to form part of his submission.

In his rebuttal submission, the learned State Attorney did not support the appeal. He submitted that the grounds adduced by the appellant are unmeritorious since the appellant in this case jumped the bail and the case was heard **ex-parte**. However, he was arrested after being found with another Criminal Case No. 11 of 2019 using another name of Shija Fabian.

On the first, second and third ground of the appeal, the appellant submitted that he was unfairly tried. The learned State Attorney went on to tell the court that the appellant was not present throughout his case after jumping bail. The accused was given the right to be heard but he denied himself following his absence.

On the 2nd ground, the State Attorney submitted that the appellant did not appear in court during the trial for six months; hence his defence that he was not present is an afterthought.

On the 3rd ground of appeal he submitted that the criminal matter has no end and the reason for his absence was not important to him.

On the 4th ground, 5th, 6th and 7th respectively, the learned State Attorney submitted that the appellant abandoned appearing in court by jumping the bail. He therefore knew he was doing was wrong and then he cannot bring those allegations. Hence he prayed to this court to uphold the lower court's decision.

In reply, the appellant contended that during the hearing of the case he was not present. He informed the prison officer that he had another case but he was taken to the court during the judgment day.

Having heard both sides and records from the court, the central issue at hand is whether the conviction of the accused in absentia can be imposed.

It is the settled principle that the trial court had powers to proceed under section 226(1) and (2) and, or, section 227(1) of the Criminal Procedure Act, Cap. 20 that;

"If at a time or place to which hearing or further hearing shall be adjourned, the accused person shall not appear before the court which shall have made the order of adjournment, it shall be lawful for such court to proceed with the hearing or further hearing as if the accused were present and if the complainant shall not appear, the court may dismiss the charge and acquit the accused with or without costs as it thinks fit.

(2) if the court convicts the accused in his absence, it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit."

In his memorandum of appeal, the appellant complained that he was unlawfully convicted in absentia and being denied his rights to defend. From the records of the court, the proceedings of the trial court speak for themselves. On the date for the hearing 6th August 2018, the accused was granted bail but he was absent without cogent reasons. The prosecution prayed for another date and arrest warrant to the accused person who jumped the bail until 11/2/2019 on the judgment date and on being inquired his whereabouts the accused submitted that he travelled and told his mother to report on his behalf. The trial court did not accept the reasons offered by the accused that

they are not valid as he jumped bail for about six months and he never sent any surety to report on his whereabouts until he was arrested on in a Criminal Case No.11 of 2019 using different name of Shija Fabian.

Having observed those facts and records from the trial court as well of the respondent ,it is my considered view that the accused is therefore estopped from complaining against the conviction and sentence passed in his absence upon his own deliberate default to appear for his defence.

The law has elaborated well that, the trial court had powers to proceed under section 226(1) and (2) and, or, 227(1) of the Criminal Procedure Act, Cap. 20. In that regard, the trial court cannot be faulted.

The court having been satisfied from the record that the accused jumped bail for no cogent reasons, finds that the accused was properly convicted. In view of the above, in my view, it is enough to dispose of the entire appeal without considering the rest of the grounds of appeal. The sentence imposed on the accused is the mandatory statutorily provided. In the result, this appeal is hereby dismissed in its entirety.

Order accordingly.

Judgment delivered under my hand and seal of the court in the chamber, this 4th day December, 2020 in the presence of the appellant only.

A. A. BAHATI

JUDGE

4/12/2020

Right of appeal is explained.

A. A. BAHATI

JUDGE

4/12/2020

